Tan Sri Datuk Diong Hiew King @ Tiong Hiew King v Lau Swee Nguong @ Lau Sui Guang

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-23–103 OF 2008
SU GEOK YIAM J
29 NOVEMBER 2012

Civil Procedure — Case management — Failure to comply with directions made by judge — Court's discretion to strike out defence and enter judgment for plaintiff — Whether new counsel should not take over brief if unable to comply with case management directions given to previous counsel — Court's construction on r 6(a) of the Legal Profession (Practice and Etiquette) Rules 1978 — Rules of Court 2012 O 34 r 2(2)

In exercise of its discretion under O 34 r 2(3) of the Rules of Court 2012, the High Court struck out the defence in the instant action, entered judgment for the plaintiff and ordered damages payable to him to be assessed by the registrar. This drastic action followed the defendant's failure to comply with the trial judge's pre-trial case management direction for parties to file and exchange their witness statements by 27 July 2012. The defendant had only one witness statement, ie his own, whilst the plaintiff had six. Prior to the direction being made, the court had rejected the defendant's second solicitor's written request to vacate the pre-fixed trial dates because counsel handling the matter would be abroad at the time. On 30 July 2012, the defendant's solicitor again wrote to court, this time to inform that the defendant would be changing his solicitor for a second time and asking for an extension of time for the defendant's witness statement to be filed and exchanged. The request was objected to by the plaintiff's solicitor on the ground the matter was being unnecessarily delayed. The court disallowed the defendant's request. The new solicitor for the defendant filed the latter's witness statement only on 9 August 2012. It was contended by him that the late filing did not prejudice the plaintiff and that even if it did, any prejudice could be compensated for with an order for costs. [The defendant has lodged an appeal to the Court of Appeal against the decision].

Held, affirming the decision:

(1) The defendant's failure to comply with the pre-trial case management direction constituted an abuse of process of the court. It obstructed the smooth administration of justice by the court in respect of the plaintiff's action, caused the bona fides of the defence to be highly questionable and gave the impression the defendant was not sincere in defending the claim.

The defendant was unable to show any reason, let alone a good one, for his failure to comply with the direction (see paras 33–35).

(2) The delay and failure on the defendant's part to comply with the direction prejudiced the plaintiff and this prejudice could not be compensated for with an order for costs. The plaintiff's counsel had duly complied with the court's direction, prepared the plaintiff's witness statements, was ready to exchange it for the defendant's one witness statement and was ready to proceed with the conduct of the plaintiff's case at trial (see para 84).

(3) Although the previous counsel who handled the defendant's case opted to go on leave during the full trial dates pre-fixed by the court, there was no excuse for him not to have prepared the defendant's witness statement and filed and exchanged it with the plaintiff's solicitors before he went on leave on 20 August 2012. Apart from duties counsel owed to his profession and to his client, there was a duty to the court to assist it in the expeditious, just and economical administration of justice and this included compliance with all directions given by the court unless good reason for non-compliance was shown (see paras 78–79).

(4) The new counsel who took over the defendant's brief had to make sure he was able to comply with the court's directions and carry them out on or before 27 July 2012. Otherwise, he ought not to have agreed to taken over the brief. The court construed r 6(a) of the Legal Profession (Practice and Etiquette) Rules 1978 to mean an advocate and solicitor should not accept any brief unless he was able to comply with the directions given by the court with regard to pre-trial case management (see paras 82–83).

[Bahasa Malaysia summary

Dalam melaksanakan budi bicaranya di bawah A 34 k 2(3) Kaedah-Kaedah Mahkamah 2012, Mahkamah Tinggi telah membatalkan pembelaan dalam tindakan ini, memasukkan penghakiman bagi plaintif dan memerintahkan ganti rugi yang perlu dibayar kepadanya ditaksirkan oleh pendaftar. Tindakan drastik diikuti kegagalan defendan mematuhi arahan pra-perbicaraan kes pengurusan hakim perbicaraan agar pihak-pihak memfailkan dan bertukar-tukar kenyataan saksi mereka sebelum 27 Julai 2012. Defendan hanya mempunyai satu kenyataan saksi, iaitu kenyataannya sendiri, manakala plaintif mempunyai enam. Sebelum arahan itu dibuat, mahkamah telah menolak permintaan bertulis yang kedua oleh peguam cara defendan untuk mengosongkan tarikh pra-tetap perbicaraan kerana peguam yang mengendalikan perkara itu akan berada di luar negara pada masa itu. Pada 30 Julai 2012, peguam cara defendan sekali lagi menulis kepada mahkamah, kali ini memaklumkan bahawa defendan akan menukar peguam caranya untuk kali kedua dan meminta lanjutan masa untuk kenyataan saksi defendan difail dan ditukarkan. Permintaan itu telah dibantah oleh peguam cara plaintif

atas alasan perkara itu sengaja dilengahkan. Mahkamah tidak membenarkan permintaan defendan. Peguam baru bagi defendan memfailkan kenyataan saksi yang kedua itu hanya pada 9 Ogos 2012. Ia telah dihujah olehnya bahawa pemfailan lewat tidak memprejudiskan plaintif dan bahawa jikapun ia memprejudiskannya, ia boleh diimbangi untuk suatu perintah bagi kos. [Defendan telah membuat rayuan kepada Mahkamah Rayuan terhadap keputusan itu].

Diputuskan, mengekalkan keputusan:

(1) Kegagalan defendan untuk mematuhi arahan pengurusan kes sebelum perbicaraan membentuk suatu penyalahgunaan proses mahkamah. Ia menghalang pentadbiran keadilan yang lancar oleh mahkamah berkenaan tindakan plaintif, menyebabkan bona fide pembelaan amat dipersoalkan dan memberi gambaran seolah-olah defendan tidak ikhlas dalam mempertahankan tuntutan. Defendan tidak dapat menunjukkan apa-apa sebab, apatah lagi suatu yang baik, kerana kegagalannya untuk mematuhi arahan tersebut (lihat perenggan 33–35).

(2) Kelewatan dan kegagalan pihak defendan untuk mematuhi arahan itu memudaratkan plaintif dan prejudis tersebut tidak boleh diimbangi untuk suatu perintah bagi kos. Peguam plaintif telah mematuhi dengan sewajarnya arahan mahkamah, telah menyediakan kenyataan saksi plaintif, telah bersedia menukarnya dengan satu-satunya kenyataan saksi defendan dan bersedia untuk terus menjalankan kes plaintif dalam perbicaraan (lihat perenggan 84).

(3) Walaupun peguam terdahulu yang mengendalikan kes defendan memilih untuk mengambil cuti semasa tarikh-tarikh yang telah ditetapkan untuk perbicaraan penuh oleh mahkamah, tiada alasan untuk dia tidak menyediakan kenyataan saksi defendan dan difailkan dan ditukar dengan peguam plaintif sebelum dia pergi bercuti pada 20 Ogos 2012. Selain daripada kewajipan peguam yang perlu dilaksanakan terhadap profesion dan kliennya, terdapat kewajipan kepada mahkamah untuk membantunya dalam, pentadbiran keadilan yang adil dan ekonomi dan ini termasuk pematuhan semua arahan yang diberikan oleh mahkamah melainkan jika terdapat sebab baik untuk ketidakpatuhan yang telah dibuktikan (lihat perenggan 78–79).

(4) Peguam baru yang mengambil alih kes defendan hendaklah memastikan dia dapat mematuhi arahan mahkamah dan melaksanakannya pada atau sebelum 27 Julai 2012. Jika tidak, dia tidak sepatutnya telah bersetuju untuk mengambil alih kes tersebut. Mahkamah menafsirkan k 6(a) Profesion Undang-Undang (Amalan dan Etika) 1978 yang bermaksud seorang peguam bela dan peguam cara tidak boleh menerima apa-apa kes

melainkan jika dia dapat mematuhi arahan yang diberikan oleh mahkamah mengenai kes pengurusan pra-perbicaraan (lihat perenggan 82–83).]

Notes

For cases on failure to comply with directions made by judge, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1894–1895.

Legislation referred to

Legal Profession (Practice and Etiquette) Rules 1978 rr 6(a), (b), 12, 16, 24(b), 31
Rules of Court 2012 O 34 rr 1(1), (3), 2, 2(3), O 94 r 3(2)
Rules of the High Court 1980 O 34, O 34 rr 4(1), 5, 6, 7

Wong Wye Wah (Kadir Andri & Partners) for the plaintiff.
Michael Chow (Michael Chow) for the defendant.

Su Geok Yiam J:

BACKGROUND

[1] In this action the plaintiff is suing the defendant for general and/or aggravated damages for defamation together with interest thereon at the rate of 8%pa from 26 November 2006 to the date of full and final settlement of the same and costs of the proceedings.

[2] The plaintiff is a prominent business man who is well known in and throughout Malaysia for his involvement in the media and publishing industry.

[3] The defamation ie slander was alleged to have taken place during a press conference held by the defendant on 26 November 2006 at the Crowne Plaza Mutiara in Kuala Lumpur (the 'press conference') in the presence and hearing of reporters from various newspapers in Kuala Lumpur and members of the general public who attended the press conference (the 'aforesaid persons').

[4] The defamation ie libel was alleged to have been contained in a press statement issued at the press conference which the defendant published of the plaintiff to the aforesaid persons by distributing to each of them a copy of the printed press statement at the press conference.

THE PLAINTIFF'S AMENDED STATEMENT OF CLAIM

[5] In his amended statement of claim, the plaintiff has averred that at the press conference the defendant delivered a speech which contained the

following defamatory words against the plaintiff in his capacity as the Chairman of the United Association of Private Chinese Secondary Schools (the 'Association'):

(a) I believe all of you are aware that after Tan Sri Tiong Hiew King has controlled 40% in Nanyang Press, then there are comments in the Chinese community. In general, the Chinese community are asking what will happen if Mr Tiong controls the two major Chinese dailies namely *Sin Chew* and *Nanyang*. Many people are talking about this matter, and I am one of them. So, today I wish to take this opportunity to share my feeling with all of you;

(b) in the past, when Tiong Hiew King brought in *Sin Chew Daily* to Sibu, the Federation of Chinese Private Schools, set up by the Chinese Community and Chinese schools, for the sake of the entire Chinese education, had raised funds of 10m dollar for the schools and had raised funds for the 14 private high schools in Sibu. He dared to dispose of the property of Federation of Chinese Private Schools by making use of *Sin Chew Daily*;

(c) the property was purchased during the 10 years when I was in charge of the Federation of Chinese Private Schools, with the money raised and collected from the society. When I retired from the Federation, I never expected he would do such thing, so I felt that the Chinese community was very lucky to have found a 'consortium' who is younger and more capable than me to take over this — to support the work of Chinese education. After the matter was entrusted to him, I felt great relieved. It is quite unexpected that hardly two years had passed after taking over the post, he had disposed of most of the property. Even the 10m dollar funds were used to build an 8 storey building. The drawing was with me then, I had returned it. But he used it.

Therefore, at that time, I had to make use of Sibu Daily because when I attended the meeting of the Federation of Private High Schools, he did not allow me to go up the stage to talk. When I touched on this matter for the first time on the stage, he attacked me in the presence of many committee members and in my presence. He listened to my talk, before I could finished half of my speech, he was unable to reply. He said he could not do anything and it was better for him to retire, to withdraw from the Federation. I consistently urged him to stay on to contribute to the Chinese education, to work for the Chinese education. From that time onwards, based on what was said by Tiong Hiew King, I realised there was some problem.

(the 'words complained of').

[6] The words complained of are an English translation of the original defamatory words which were uttered in Mandarin by the defendant. A

[7] The defendant had uttered and published the defamatory words concerning the plaintiff personally and in the way of his office as the chairman of the association and in relation to his conduct therein, in the presence and hearing of reporters from various newspapers in Kuala Lumpur and members of the general public who attended the press conference. B

[8] The speech concerning the defamatory words was also contained in a written press statement, which was published by the defendant of and concerning the plaintiff to persons present at the press conference by distributing to them copies of a printed press statement in the English and Malay languages at the press conference. C D

[9] Apart from the above averments, the plaintiff has also in paras 6, 7, 8, 9, 10, 11 and 12 of his amended statement of claim averred as follows:

> 6. As the defendant well knew, reporters employed by various newspapers were present at the said press conference and the defendant well knew and intended that a report of his words either in written or spoken form would be published in any of the various newspapers circulated in Kuala Lumpur. E
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> 7. The said words in their natural and ordinary meaning and/or inferential meaning and/or understood in the context in which they were stated meant and were understood to mean that: F
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> 7.1 The plaintiff was a person who had misused his position of responsibility in the Association;
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> 7.2 The plaintiff had betrayed the interest of the Association either in favour of *Sin Chew Daily* or otherwise; and G
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> 7.3 The plaintiff had mismanaged the funds and assets of the Association.
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> 8. The said words further meant or were understood to mean in their innuendo meaning by those with knowledge that the plaintiff was at the time the Chairman of the Association that; H
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> 8.1 The plaintiff had misused his position as Chairman of the Association; and
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> 8.2 The plaintiff was unfit to be or continue to be the Chairman of the Association. I
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> 9. In the premises, by reason of the publication of the said defamatory words, the plaintiff has been gravely injured in his credit and reputation as a prominent businessman and also as the Chairman of the Association and has

A been brought into public scandal, odium and contempt and has been lowered in the estimation of right thinking persons and members of society generally.

10. The aforesaid defamatory words referred to and/or were understood to refer to the plaintiff. Alternatively the defamatory words pleaded were such as would reasonably lead ordinary sensible persons with knowledge of the plaintiffs position as Chairman of the Association and as Executive Chairman of Sin Chew Media Corporation and persons acquainted to the plaintiff to believe that the person referred to by those words was the plaintiff.

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11. By a letter dated 24 April 2008 from the plaintiff's solicitors, Messrs Kadir, Andri & Partners, the plaintiff demanded inter alia a full retraction and apology of the foregoing defamatory statements together with an undertaking that the defendant would not repeat the foregoing defamatory remarks or words.

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12. Until to date the defendant has failed, neglected and/or refused to comply with the aforesaid demands.

THE DEFENDANT'S AMENDED STATEMENT OF DEFENCE

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[10] In his amended statement of defence dated 9 September 2009 ('defence'), the defendant has denied that he had uttered the words complained of and that they were defamatory of the plaintiff. The defendant has also relied on the defences of justification and fair comments on matters of public interest.

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[11] In para 4.1 of his defence, the defendant has put the plaintiff to strict proof of what is alleged to have been said at the press conference.

[12] In para 4.2 of his defence, the defendant admitted that he made a speech at the press conference but he averred that at the press conference, the issues of the ownership of the newspapers in question and the management of the funds and property of the association were raised.

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[13] In 4.3 of his defence, the defendant averred that he would refer to his entire speech for the context and true meaning of the words complained of.

[14] In para 4.4 of defence, the defendant denied that the said words were calculated to disparage the plaintiff personally and in his office as the chairman of the board of management of the association and in relation to his conduct as the chairman of the board of management of the association.

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[15] In para 4.5 of his defence, the defendant averred that he has no knowledge of the identity of the persons who attended the press conference.

[16] In para 5 of his defence, the defendant denied that he published a written press statement of and concerning the plaintiff at the press conference by distributing the press statement in the English and Malay languages to the persons attending the press conference. The defendant averred that what he distributed to the persons attending the press conference was in respect of an offer to purchase Nanyang Holdings.

[17] In para 7 of his defence, in response to para 7 of the plaintiffs amended statement of claim, the defendant has averred as follows:

> 7.1 The defendant denies that the said words, in their natural and ordinary meaning, in their proper context, bore or were understood to bear or were capable of bearing the meanings or either of them pleaded in paras 7.1, 7.2 and 7.3 of the statement of claim.
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> 7.2 Further or alternatively, if and insofar as the said words in their natural and ordinary meaning, in their proper context, bore or were understood to bear orwere capable of bearing the meanings set out below, they were true in substance and in fact:
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> (i) That the plaintiff monopolizes the Chinese language newspapers by having a controlling stake in Nanyang Holdings as well as in *Sin Chew Daily*.
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> (ii) That the plaintiff had failed to act in the best interest of the Association and uphold its objective of promoting and enhancing Chinese education when dealing with the property which was donated by one Madam Lau Nga Huong sometime in February 1963 ('the said Land').
>
> (iii) That the plaintiff had failed to act in the best interest of the Association and uphold its objective of promoting and enhancing Chinese education when dealing with the funds of RM10m raised by the Association to further Chinese education.
>
> Association to further Chinese education.
>
> (a) The plaintiff was already the majority shareholder of 2 main Chinese language newspapers circulating in Malaysia, namely, *Guang Ming Daily News* and *Sin Chew Daily*, when the plaintiff acquired a controlling stake in Nanyang Holdings.
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> (b) After the acquisition of Nanyang Holdings by the plaintiff, there were concerns by the Chinese community that the plaintiffs monopoly of the Chinese language newspapers would adversely affect the fair and balanced reporting of the Chinese language newspapers controlled by the plaintiff.
>
> (c) The said Land was not dealt with in accordance with the best interests of the Association and the objective of the Association

of promoting and enhancing Chinese education.

(i) The said Land was donated by Madam Lau Nga Huong sometime in 1963 for the purpose of promoting and enhancing Chinese education.

(ii) The said Land was eventually transferred to the Sibu English Secondary School sometime in February 1969.

(iii) At the material time, there was an understanding between the trustees of the Sibu English Secondary School to develop the said Land by constructing 20 units of commercial shophouses and in that regard, a company known as Unipoland Development Bhd ('the Developer') was granted the right to develop the said Land.

(iv) It was the understanding between the trustees of the Sibu English Secondary School and the developer that upon completion of development, the Sibu English Secondary School shall have 7 units of the shophouses and the Developer shall have the remaining 13 units of the shophouses. The trustees of the Sibu English Secondary School in turn resolved to donate the said 7 units of shophouses to the Association.

(v) The Association subsequently purchased the Developer' entire interests in the said Land when the defendant became the Chairman of the Board of Management of the Association. It was resolved sometime in September 1997 that the Association shall develop the said Land by constructing 20 units of shophouses, and utilize the income generated from the development for the purposes of promoting and enhancing Chinese education.

(vi) After the plaintiff assumed the post of the Chairman of the Board of Management of the Association sometime in 1998, the Association Federation sold that part of the said Land earmarked for the construction and development of 12 units of shophouses for the purposes of funding the construction of an 8 storey building which was to be used as the headquarter of the Association.

(d) That the funds of RM10m raised by the Association was not dealt with in accordance with the best interest of the Association and its objective of promoting and enhancing Chinese education.

(i) Sometime in 1994, one Datuk Hii Yu Chiong and one Dato' Seri Lau Hui Kang and the defendant set up the RM10 million Education Funds ('the Education Funds') to provide assistance to the independent Chinese private education schools in Sibu.

(ii) There was an understanding that the Education Funds was to be placed into interest earning accounts ('the principal sum') and the interest generated therefrom shall be utilised for the purposes of providing assistance to the Chinese private education schools in Sibu.

(iii) After the plaintiff assumed the post of the Chairman of the Board of Management of the Association, the plaintiff proposed to utilize RM4m of the principal sum contrary to the understanding.

(iv) Despite demand by the defendant for an explanation the plaintiff failed to explain the manner in which the sum of RM4m shall be utilised.

(e) That there were concerns amongst the Chinese community that the said Land and the Education Funds were not dealt with in accordance with the best interest of the Association and the objective of the Association of promoting and enhancing Chinese education.

(f) That there were concerns amongst the Chinese community that the coverage by *Sin Chew Daily* on the issues concerning the sale of a portion of the said Land and the manner in which the Education Funds were utilised were biased and unfair.

7.3 Further or alternatively, if and insofar as the said words made or contained the following comments or expression of opinion, they were fair comments on matters of public interest:

(i) That by acquiring Nanyang Holdings when the plaintiff was already the majority shareholder of 2 main Chinese language newspapers circulating in Malaysia, namely, *Guang Ming Daily News* and *Sin Chew Daily*, the plaintiff is monopolizing the Chinese language newspapers.

(ii) That the plaintiffs monopoly of the Chinese language newspapers would adversely affect the fair and balanced reporting of the Chinese language newspapers controlled by the plaintiff.

(iii) That the manner in which the plaintiff caused the Association to deal with the said Land and the Education Funds was not in accordance with the best interest of the Association and its objective of promoting and enhancing Chinese education.

PARTICULARS OF FACT UPON WHICH COMMENT IS BASED

(a) The plaintiff was already the majority shareholder of 2 main Chinese language newspapers circulating in Malaysia, namely, Guang Ming Daily News and Sin Chew Daily, when the plaintiff acquired a controlling stake in Nanyang Holdings.

(b) After the acquisition of Nanyang Holdings by the plaintiff, there were concerns by the Chinese community that the plaintiffs monopoly of the Chinese language newspapers would adversely affect the fair and balanced reporting of the Chinese language newspapers controlled by the plaintiff.

(c) The said Land was not dealt with in accordance with the best interest of the Sibu English Secondary School and the objective of the Association of promoting and enhancing Chinese education.

(i) The said Land was donated by Madam Lau Nga Huong sometime in February 1963 for the purpose of promoting and enhancing Chinese education.

(ii) The said Land was eventually transferred to the Sibu English Secondary School sometime in February 1969.

(iii) At the material time, there was an understanding between the trustees of the Sibu English Secondary School to develop the said Land by constructing 20 units of commercial shophouses and in that regard, a company known as Unipoland Development Berhad ('the Developer') was granted the right to develop the said Land.

(iv) It was an understanding between the trustees of the Sibu English Secondary School and the Developer that upon completion of development, the Sibu English Secondary School shall have 7 untis of the shophouses and the Developer shall have the remaining 13 units of the shophouses. The trustees of the Sibu English Secondary School in turn resolved to donate the said 7 units of shophouses to the Association.

(v) The Association subsequently purchased the Developer's entire interests in the said Land when the defendant became the Chairman of the Board of Management of the Association. It was resolved sometime in September 1997 that the Association Federation shall develop the said Land by constructing 20 units of shophouses, and utilize the income generated from the development for the purposes of promoting and enhancing Chinese education.

(vi) After the plaintiff assumed the post of the Chairman of the Board of Management of the Association sometime in 1998, the Association Federation sold that part of the said Land earmarked for the construction and development of 12 units of shophouses for the purposes of funding the construction of an 8 storey building which was to be used as the headquarter of the Association.

(d) That the funds of RM10m raised by the Association was not dealt with in accordance with the best interest of the Association and its objective of promoting and enhancing Chinese education.

(i) Sometime in 1994, one Datuk Hii Yu Chiong and one Dato' Seri Lau Hui Kang and the defendant set up the RM10m Education Funds ('the Education Funds') to provide assistance to the independent Chinese private education schools in Sibu.

(ii) There was an understanding that the Education Funds was to be placed into interest earning accounts ('the principal sum') and the interest generated therefrom shall be utilised for the purposes of providing assistance to the Chinese private education schools in Sibu.

(iii) After the plaintiff assumed the post of the Chaiman of the Board of Management of the Association, the plaintiff proposed to utilize RM4m of the principal sum contrary to the understanding.

(iv) Despite demand by the defendant for an explanation, the plaintiff failed to explain the manner in which the sum of RM4mn shall be utilised.

(e) That there were concerns amongst the Chinese community

that the said Land and the Education Funds were not dealt with in accordance with the best interest of the Association and the objective of the Association of promoting and enhancing Chinese education.

(f) The there were concerns amongst the Chinese community that the coverage by *Sin Chew Daily* on the issues concerning the sale of a portion of the said Land and the manner in which the Education Funds were utilised were biased and unfair.

[18] In para 8 of his defence, in response to para 8 of the plaintiff's amended statement of claim, the defendant denied that the said words bore or were understood to bear or were capable of bearing the meanings or either of them pleaded in paras 8.1 and 8.2 of the plaintiff's amended statement of claim and that the defendant shall rely on the averments as set out in paras 7, 7.1, 7.2 and 7.3 of his defence.

[19] In para 13 of his defence, the defendant has, therefore, denied that the plaintiff is entitled to any damages, whether aggravated or otherwise.

THE PLAINTIFF'S REPLY TO THE DEFENCE

[20] In the plaintiff's reply to the defence ('Reply'), the plaintiff has reiterated the averments in his amended statement of claim.

[21] In para 2 of his reply, the plaintiff has denied para 7.2 of the defence that the words complained of were true in substance and in fact as averred by the defendant.

[22] The plaintiff has also averred as follows:

2.1 *Sin Chew Daily* and *Guang Ming Daily* are Chinese language newspapers owned by Sin Chew Media Corporation whereas *Nanyang Siang Pau* and *China Press* are Chinese language newspapers owned by Nanyang Press Holdings Berhad ('Nanyang Press');

2.2 The plaintiff has never used his position as a shareholder in Sin Chew Media Corporation and Nanyang Press in any away detrimental to the interests of the Association;

2.3 The plaintiff does not play any role in determining the editorial policy of *Sin Chew Daily* and/or *Guang Ming Daily* and/or *Nanyang Siang Pau* and/or *China Press*;

2.4 The said Land, and all decisions pertaining thereto, was dealt with by the Development Committee of the Association in accordance with the best interest of the Association and its objective of promoting and enhancing Chinese education;

2.5 The plaintiff has never utilised or cause to be utilised the money from the funds raised by the Association called 'the Education Funds' in any way detrimental to the interests of the Association; and

2.6 The construction of an 8 storey building as the headquarter of the Association symbolises the commitment and influence that the Association has in the Chinese independent school education in accordance with the best interest of the Association and its objective of promoting and enhancing Chinese education. The said building was used as the management centre of the Association as well as to provide facilities for educational programmes and events organized by the Association.

Particulars

(a) (i) On or about April 1963, one Madam Lau Nga Huong ('Madam Lau') transferred the said Land to two individuals for reason known to herself;

(ii) The said Land was eventually transferred to the Sibu English Secondary School ('Sibu ESS') on or about February 1969;

(iv) Sometime in 1987, through the assistance of Unipoland Development Berhad ('the Developer'), the application was made to convert the said Land for commercial use. It was mutually agreed between the trustees of Sibu ESS and the Developer that the Developer will develop the said Land into a commercial complex with 20 units of commercial units whereby the Developer will be entitled to 13 commercial units and Sibu ESS be entitled to 7 commercial units upon completion of the said development;

(iv) Sibu ESS thereafter donated the said 7 commercial units to the Association;

(v) The Association subsequently purchased the Developer's entire interests in the said Land and formed a sub-committee of the Association that would be responsible for the development of the said Land ('the Development Committee'). The defendant was appointed as the co-ordinator of the Development Committee. At the material time, the defendant was still the Chairman of the Association;

(vi) There was an understanding between members of the Development Committee that the general idea behind the development of the said Land was to develop some of the commercial units into a private education centre for the purpose of promoting and enhancing Chinese education;

(vii) During a Development Committee meeting held on 21 June 1996, it was resolved, inter alia, that a 4 storey commercial building would be constructed on the said Land and a plaque would be put up in the name of the Association and in memory of Madam Lau. It was also resolved that the front part of the building would be used as the management office of the Association and that the piling for the

foundation base of the building would be sufficient for an 8 storey building, so as to cater for expansion. The Development Committee, during its meeting held on 24 June 1996, agreed to appoint James Sie & Associates as the architect in respect of the development of the said Land;

(viii) On 4 April 1997, the Development Committee held a meeting with the representatives of the architect to discuss the development plan of the said Land. It was proposed that the plan would, inter alia, include construction of 10 to 12 units of 4 storey shop houses to be linked with an 8 storey building for the Association:

(ix) During the Association's Annual General Meeting held on 21 June 1998, the defendant announced his retirement as the Chairman of the Association. It was also unanimously agreed that matters pertaining to the development of the said Land would be left to discussion and decision of the new Board of Directors of the Association. The plaintiff was then elected as the Chairman of the Association;

(x) The Development Committee thereafter submitted an application for subdivision of the said Land for construction of, inter alia, 2 rows of 4 storey shop houses, consisting of 6 units for each row, together with an 8 storey complex forming a U pattern with the 2 rows of shop houses facing each other. The said application was registered on 2 November 1999;

(xi) The Association occupied 2 floors of the 8 storey building and used it as the management office and meeting/conference hall of the Association respectively. The other 4 floors were rented out so that the rental proceeds could be used as subsidies for the private Chinese schools for the general expenses pertaining to the upkeep/maintenance and purchase of the said schools' equipment and furniture, stationery, payment of utility bills as well as salary of teachers and other administrative and support staff members. The remaining 2 floors are vacant.

(b)

(i) The Education Funds were raised by the Association for the purpose of funding students, teachers and the Chinese private schools;

(ii) The money collected during the raising of the Education Funds amounted to RM8,675,000 and was kept in a separate bank account of the Association;

(iii) The Association only utilised the annual accrued interest of the said amount collected for the purpose of providing awards to students with outstanding performance in various public examinations of the private Chinese schools. The amount of money in the Education Fund kept in the respective bank account as at 31 December 2008 was RM 9,009,162.96 whereby the unutilized accrued interest as at

31 December 2008 amounted to RM 334,162.96. The plaintiff has never proposed to utilize RM 4 million of the money in the Education Fund;

(c)

(i) The editorial policy of *Sin Chew Daily* and *Guang Ming Daily* is determined by the Editorial Committee of the said newspapers. The said committee makes all decisions regarding publication of any news in the said newspapers so as to ensure that the news reported are accurate and fair;

(ii) The plaintiff is and was a member of the Board of Directors of Sin Chew Daily but not a member of the Editorial Committee of the same. The plaintiff is and was not a member of the Editorial Committee of *Guang Ming Daily*;

(iii) The above is also true in relation to the *Nanyang Siang Pau* and *China Press*.

[23] In para 3 of his reply, the plaintiff has averred that he has no knowledge of the averments set out in paras 7.2 (d) (iii) and (iv) of the defence and he has put the defendant to strict proof thereof.

[24] In para 4 of his reply, the plaintiff has denied para 7.3 of the defence that the words complained of were fair comments on matters of public interest as averred by the defendant.

[25] The plaintiff has also averred as follows:

4.1 The said defamatory words are based on facts that are not truly stated and the plaintiff repeats paragraph 2 above;

4.2 In any event, the publication by the defendant of the said defamatory words was actuated by malice, particulars of which are set out in paragraph 5 below; and

4.3 The statements made by the defendant were in pursuance of a private agenda.

[26] In para 5 of his reply, the plaintiff has averred further and/or alternatively, that the said defamatory words were published maliciously.

[27] The plaintiff has particularised the defendant's malice as follows:

Particulars of Malice

5.1 The defendant is the Chairman of Sibu-based KTS Group of Companies that owns *Oriental Daily News, See Hua Daily News, The Borneo Post* and

Utusan Borneo. KTS Group of Companies is also the main competitor of Sin Chew Media Group of Companies;

5.2 The plaintiff is one of the main shareholders of Nanyang Press. Nanyang Press is the owner of the leading Chinese dailies *Nanyang Siang Pau* and *China Press*. As early as May 2001, it was well known that the plaintiff was interested in the acquisition of shares of Nanyang Press. As at 30 September 2002, the plaintiff indirectly, had an interest in 0.56% of the shares in Nanyang Press;

5.3 Thereafter, at or about early 2004 until late 2006, the defendant had published or caused the publication of numerous articles in the Oriental Daily News falsely attacking and disparaging the character, integrity and trustworthiness of the plaintiff in general and in relation to the plaintiffs acquisition of shares in Nanyang Press;

5.4 On 17 October 2006, the plaintiff, through the acquisition of 21.02% of the voting shares of Nanyang Press by Ezywood Options Sdn Bhd, increased his direct and indirect interests in Nanyang Press from 23.74% to 44.76% and thus became its single largest shareholder;

5.5 The defendant held the press conference on 26 November 2006 at Crowne Plaza Mutiara in Kuala Lumpur to make an offer in his private capacity to purchase shares in Nanyang Press but in doing so had published ot caused the publication of the said defamatory words recklessly and/or with the knowledge that the said words complained were not true and/or without regard to or careless as to the truth or falsity of the same in order to victimize the plaintiff and to defame his character in order to advance his own purpose in acquiring control of Nanyang Press;

5.6 The defendant, as the Chairman of KTS Group of Companies, had used the said press conference for the collateral purpose of advancing his personal vendetta relating to his unhappiness over the plaintiffs interest in Nanyang Press;

5.7 The defendant harbours personal feelings of ill will and rivalry towards the plaintiff;

5.8 The defendant had decided to come to Kuala Lumpur on 26 November 2006 to make the said press conference in the hope of gaining a wider audience knowing that there would be reporters from various newspapers based and published in Kuala Lumpur and members of the general public at the said press conference and by doing so had intentionally caused wider circulation of the matters set out during the said press conference, containing defamatory statementsof the plaintiff, in and throughout Malaysia; and

5.9 The defendant's dominant motive in publishing the said defamatory words is to direct ill will towards the plaintiff and to damage his reputation and/or for the collateral purpose of portraying that the plaintiff is a dishonest person who had used his position in the Chinese media industry to influence the reporting of any news in the newspaper controlled by him.

A DECISION OF THE COURT IN STRIKING OUT THE DEFENDANT'S DEFENCE

[28] On 10 August 2012, during the case management of the plaintiff's action, upon the failure of the defendant to comply with the direction of the court given on 21 June 2012 to file and exchange his witness statement with the witness statements of the plaintiff, the court struck out the defendant's defence. The court entered judgment on the issue of liability in favour of the plaintiff against the defendant.

[29] The court also ordered that the quantum of damages suffered by the plaintiff and payable by the defendant be assessed by the learned senior assistant registrar ('SAR'). The court also ordered the defendant to pay to the plaintiff the costs of the proceedings which are to be assessed by the learned SAR.

[30] The court further ordered that the dates, 10 to 12 September 2012, already fixed during case management on 18 April 2012 by Hue Siew Kheng J for the full trial of the plaintiffs action be converted to dates for the assessment of damages suffered by the plaintiff before the learned SAR (the 'said decision').

[31] Being dissatisfied with the said decision the defendant has filed a notice of appeal to the Court of Appeal against the said decision.

F REASONS FOR THE SAID DECISION

[32] Below are the reasons why the court made the said decision.

[33] The court agreed with and accepted the submissions of learned counsel for the plaintiff that the failure of the defendant to comply with the direction of the court given on 21 June 2012 constituted an abuse of the process of the court.

[34] The reasons are, firstly, it had obstructed the smooth administration of justice by the court in respect of the plaintiff's action. Secondly, it has caused the bona fides of the defendant's defence to the plaintiff's claim as set out in his defence to be highly questionable. Thirdly, the court was of the impression that the defendant was not really sincere in defending the plaintiff's claim.

[35] The defendant could not show any reason for his non-compliance of the previous direction of the court to file and exchange his witness statement with learned counsel for the plaintiff on or before 27 July 2012 let alone a good reason.

[36] The court was not told the reason why Mr Ahmad Moosdeen, the solicitor from Messrs Chan, Moosdeen & Partners, who had taken over the conduct of the defendant's case from Messrs Shearn, Delamore & Co since 15 September 2011 could not have prepared, filed and exchanged the witness statement of the defendant with the plaintiff's learned counsel on or before 27 July 2012. From the court's records, Messrs Chan, Moosdeen & Partners had complied with the previous directions of the court given during the pre-trial management of the case in order to prepare the case for full trial.

[37] Mr Michael Chow, learned counsel for the defendant informed the court that the defendant's witness statement was filed on 9 August 2012 which was a day earlier. He submitted that there was no prejudice caused to the plaintiff which could not be compensated by an order for costs pursuant to r 2 of the Rules of Court 2012. He also conceded that the defendant had no good reason for the delay.

ORDER 34 OF THE RULES OF THE HIGH COURT 1980

[38] The court noted that this case has been actively managed by the court to prepare it for full trial pursuant to O 34 of the Rules of the High Court 1980 (the 'RHC 1980').

[39] Rule 4(1) of the Order empowers the court on the first pre-trial conference to make such orders and give such directions as to the future conduct of the action to prepare its just, expeditious and economical disposal.

[40] Rule 5 of the same Order provides that if the court to which the action has been assigned is, for any reason whatsoever, unable, at the first pre-trial conference, to give all the directions necessary for the trial of the action, it may give such directions as are necessary at that stage of the proceedings and shall fix the date of the next pre-trial conference.

[41] Rule 6 of the same Order empowers the court, inter alia, on its own motion or on application by letter by any party, to schedule and convene as many pre-trial conferences as it may deem necessary for the giving of directions or of such further directions as it may deem necessary.

[42] Finally, r 7 of the same Order empowers the court to make such order against any party to an action who fails to comply with any direction given by the court (the 'defaulting party') at any pre-trial conference, as meets the ends of justice.

ORDER 34 OF THE RULES OF COURT 2012

[43] The Rules of Court 2012 ('RC 2012') which repealed the RHC 1980 came into force on 1 August 2012.

[44] Order 94 r 3(2) of the RC 2012 expressly provides that all pending actions and applications that were commenced before the date of coming into operations of the RC 2012 shall, from the date of coming into operation of the RC 2012, proceed in accordance with the provisions of the RC 2012.

[45] Order 34 of the RC 2012 contains elaborate provisions for pre-trial case management which are in essence similar to O 34 of the RHC 1980.

[46] Rule 1(1) of the Order confers power and discretion on the court to make orders and give directions, at any time after the commencement of proceedings for their just, expeditious and economical disposal.

[47] Where any party fails to comply with any order made or direction given by the court under Rule 1(1) of the Order, then r 1(3) of the Order empowers the court to, inter alia, strike out the defence or make such other order as it thinks fit.

[48] Rule 2 of the Order deals with pre-trial case management which is directed by the court. It encompasses a very wide range of matters which the court can consider including the appropriate orders and directions that should be made by the court to secure the just, expeditious and economical disposal of the action or proceedings. In my view this provision applies to the instant case.

[49] Rule 2(3) of the Order confers discretion on the court to, inter alia, strike out the defence or enter judgment or make such order as it thinks fit.

[50] The rule reads as follows:

> (3) The Court, having given directions under rule 2(2) or rule 3 may either on its own motion or upon the application of any party, if any party defaults in complying with any such directions, dismiss such action or proceedings or strike out the defence or counterclaim or enter judgment or make such order as it thinks fit.

BUNDLE OF PLEADING AND COMMON BUNDLE OF DOCUMENTS

[51] The solicitors for both parties have filed the bundle of pleadings on 14 September 2009 and three volumes of the common bundle of documents in three parts on 10 May 2012.

LIST OF WITNESSES

[52] The defendant's List of Witnesses ('LOWs') was filed by Messrs Chan, Moosdeen & Partners on 23 May 2012. It contained the name of one witness ie the defendant himself.

[53] The plaintiff's LOWs was filed on 10 May 2012 by Messrs Kadir, Andri & Partners. It had eight witnesses.

[54] The following are the plaintiff's eight witnesses:

(a) Tan Sri Datuk Diong Hiew King @ Tiong Hiew King (the plaintiff himself);

(b) Kok Su Chin;

(c) Kum Lai Ming;

(d) Pook Ah Lek;

(e) Siew Nyoke Chow;

(f) Lai Geok Keng;

(g) Chai Tian Yew; and

(h) Francis Yii Kwong Ung.

WITNESS STATEMENTS

[55] The plaintiff was able and ready to file a total of six witness statements on 27 July 2012.

[56] They were for the following six witnesses who were named in his LOWs:

(1) Tan Sri Datuk Diong Hiew King @ Tiong Hiew King (the plaintiff himself);

(2) Kok Su Chin (a reporter with Sin Chew Daily at the material time who allegedly attended the press conference held by the defendant);

(3) Kum Lai Ming (a senior reporter with Sin Chew Daily at the material time who allegedly attended the press conference held by the defendant, made a recording of the defendant's press statement and received a copy of the press conference statement in both the English and Chinese languages and who together with Kok Su Chin made a transcript of the recording);

(4) Pook Ah Lek (the superior officer of Kok Su Chin Kum and Lai Ming at the material time who allegedly received, inter alia, a cassette tape, a transcript and a report from Kum Lai Ming on the press conference which they allegedly attended);

(5) Chai Tian Yew (the Administration Human Resource Manager of the Rimbunan Hijau Group at the material time who allegedly received a cassette tape from Pook Ah Lek); and

(6) Francis Yii Kwong Ung (who allegedly received a cassette tape from one Mr. Peter Wong and he allegedly converted the content into a digital format).

[57] On 10 May 2012, the plaintiff also applied for and paid the praecipe for the issue of a subpoena for one Wong Ah Ying.

[58] The parties filed a separate statement of issues to be tried. The plaintiff filed his on 10 May 2012. It has six issues to be tried.

[59] The defendant filed his on 23 May 2012. It also has six issues.

SIX ISSUES TO BE TRIED

[60] A comparison of the two separate statements of issues to be tried shows that the only difference between the two statements of issues to be tried is the word 'libel' used by the plaintiff in issue No 2 in relation to the written press statement published by the defendant at the press conference.

[61] Apart from that one difference, both parties took a similar stand that the court has to determine the following six issues:

(a) Whether the words complained off were defamatory of the plaintiff?

(b) Whether the written press statement issued by the defendant at the press conference was defamatory of the plaintiff?

(c) Whether the defence of justification had been proved by the defendant?

(d) Whether the defence of fair comment had been proved by the defendant?

(e) Whether the defence of fair comment had been defeated by malice? And

(f) Whether the plaintiff is entitled to damages and aggravated damages resulting from the defamation on the part of the defendant and if so, what is the amount?

CASE SUMMARY

[62] Both parties filed their respective case summary. The plaintiff filed his on 10 May 2012 and the defendant filed his on 23 May 2012.

STATEMENT OF FACTS

[63] Both parties could not agree on filing a statement of agreed facts. So the parties filed a separate statement of facts. The plaintiff filed his on 10 May 2012

and the defendant filed his on 23 May 2012.

UNDISPUTED FACTS

[64] From both parties' statement of facts, the court noted that the following facts were undisputed:

(a) The plaintiff is a prominent businessman and is involved in the media and publishing industry;

(b) At all material times, the plaintiff was and is the Executive Chairman of Sin Chew Media Corporation which publishes and circulates the Chinese language newspaper *Sin Chew Daily News* and *Guang Ming Daily News* in and throughout Malaysia and Group Chairman of Ming Pao Enterprise which is a media group based in Hong Kong which produces and circulates the Chinese language newspaper Ming Pao in and throughout Hong Kong, Canada and the United States of America. The plaintiff is also the Chairman of the Board of Management of the United Association of Private Chinese Secondary Schools;

(c) The defendant is an individual. At all material times, the defendant was a director of Oriental Daily Sdn Bhd, Penerbitan Cerdas Maju Sdn Bhd and Teras Sempurna Sdn Bhd. The defendant is known to employ the pseudonym or pen name Liu Rui Yuan or its equivalent in the Mandarin written script;

(d) The defendant published and distributed a press statement to those who were present at the press conference;

(e) On or about April 1963, one Madam Lau Nga Huong ('Madam Lau') donated a property (the 'said land');

(f) The said land was transferred to the Sibu English Secondary School ('Sibu ESS') on or about February 1969;

(g) Sometime in 1987, through the assistance of Unipoland Development Berhad ('the Developer'), an application was made to convert the said Land for commercial use. It was mutually agreed between the trustees of Sibu ESS and the Developer that the Developer will develop the said land into a commercial complex with 20 units of commercial units whereby the Developer will be entitled to 13 commercial units and Sibu ESS will be entitled to 7 commercial units upon completion of the said development;

(h) Sibu ESS thereafter donated the said 7 commercial units to the Association;

(i) The Association subsequently purchased the Developer's entire interests in the said Land when the defendant was still the Chairman of the Association; and

(j) By a letter dated 24 April 2008 from the plaintiffs solicitors, Messrs. Kadir, Andri & Partners, the plaintiff demanded, inter alia, a full retraction and

apology of the foregoing defamatory statements together with an undertaking that the defendant would not repeat the foregoing defamatory words.

[65] This case is an old case as it was filed by the plaintiff in the year 2008. The plaintiff's writ of summons is dated 10 June 2008. The defendant entered his appearance vide his memorandum of appearance dated 15 July 2008. It was filed by his first set of solicitors, namely, Messrs Shearn, Delamore & Co.

[66] Four years down the road, the defendant is still unable to comply with the court's direction given on 21 June 2012 for the filing and exchange of his witness statement with the witness statements of the plaintiff's six witnesses.

[67] On 20 June 2012, I received a letter dated 25 May 2012 from the defendant's second set of solicitors, Messrs Chan, Moosdeen & Partners. It requested for the full trial dates already fixed on 10 to 12 September 2012 to be vacated and new trial dates fixed in October or November 2012. It gave two reasons to support the request.

[68] The first reason was that the counsel handling the matter, namely, Mr Ahmad Moosden would be overseas in the Phillipines from 20 August 2012 until 19 September 2012 and that he had already made payment for his flight ticket and accommodation. The second reason was that when the full trial dates were fixed by the learned judge of High Court Civil 2, Miss Sunita Sankey who appeared for the defendant before the learned judge was not aware that Mr Ahmad Moosden will be overseas in the Phillipines from 20 August 2012 until 19 September 2012 and that he had already made payment for his flight ticket and accommodation.

[69] I rejected the request for a postponement. I was of the view that the two reasons were not good reasons. It was and it still is the duty of the counsel, namely, Mr Ahmad Moosden, to ensure that he kept Miss Sunita Sankey informed of his free dates.

[70] Rule 24(b) of the Legal Profession (Practice and Etiquette) Rules 1978 (the 'LP (P & E) Rules 1978') expressly provides that an advocate and solicitor may apply for postponement of a case fixed for hearing for good and cogent reasons only.

[71] Rule 6(a) of the LP (P and E) Rules 1978 expressly provides that an advocate and solicitor shall not accept any brief unless he is reasonably certain of being able to appear and represent his client on the required day.

[72] Rule 6(b) of the LP (P and E) Rules 1978 expressly provides that an advocate and solicitor shall not ordinarily withdraw from an engagement once accepted, without sufficient cause unless reasonable and sufficient notice has been given to the client.

[73] The rejection of the defendant's request for a postponement by the court was duly informed to the defendant's second set of solicitors.

[74] On 21 June 2012, I directed the parties to file and exchange their witness statements on or before 27 July 2012. I was of the view that the firm of Messrs Chan, Moosdeen & Partners who had the conduct of the defendant's case had to comply with the direction of the court since the bundle of pleadings, the common bundles of documents, the statement of issues to be tried, the summary of case, the statement of facts and the LOWs had been filed pursuant to the directions of the court given pursuant to O 34 of the RHC 1980.

[75] On 30 July 2012, I received a letter dated 26 July 2012 from Messrs Chan, Moosdeen & Partners. It informed the court that the defendant was in the process of engaging a third set of solicitors to replace the firm of Messrs Chan, Moosdeen & Partners. It also requested that the defendant be given an extension of time from 27 July 2012 to 10 August 2012 to file and exchange the defendant's witness statement with the plaintiff.

[76] On the same date I also received a letter from the plaintiff's solicitors, Messrs Kadir, Andri & Partners. It was dated 27 July 2012. It objected to the request by the defendant's solicitors on the ground that there was a delay of one month on the part of the defendant to engage a new set of solicitors to take over the conduct of the defendant's case and to file and exchange the witness statement.

[77] On 31 July 2012, I rejected the request of the defendant's second set of solicitors to extend time for the filing and exchanging of the defendant's witness statement with that of the plaintiff. I accepted the objection of the plaintiff's solicitors and the reason contained in their letter.

[78] I was of the view that although the counsel who was handling the defendant's case has opted to go on his vacation leave during the full trial dates already fixed by the court there was no excuse for the counsel not to prepare the defendant's witness statement, file it and exchange it with the plaintiff before he actually goes on his vacation leave on 20 August 2012.

[79] It is trite law that a counsel has three duties. The first duty which a counsel owes is to the court. I understand this duty to mean that a counsel must

assist the court in the expeditious, just and economical administration of justice by the court which encompasses the compliance with all directions given by the court unless there is good reason shown.

[80] Rule 12 of the LP (P and E) Rules 19788 expressly provides that an advocate and solicitor shall not conduct a civil case or make a defence which is intended merely to delay proceedings or to harass or injure the opposite party or to work oppression or wrong.

[81] The second duty which a counsel owes is to his profession. It means that he must conduct himself in an appropriate manner when handling a case before the court so as to uphold the dignity and high standing of his profession. This is clearly provided in r 31 of the LP (P and E) Rules 1978. The third duty which a counsel owes is to his client. It means that a counsel must fearlessly uphold the interest of his client. In other words he must present his client's case in the best possible light before the court with all due courtesy to the court. This is expressly provided in r 16 of the LP (P and E) Rules 1978.

[82] In the instant case since the new counsel ie Mr Michael Chow has agreed to take over the brief from the previous counsel ie Mr Ahmad Moodeen without the preparation and filing and exchange of the defendant's witness statement with that of the plaintiff by the previous counsel on record then he (Michael Chow) must make sure that he is able to comply with the court's directions and to carry them out before or on 27 July 2012.

[83] Otherwise he ought not to have agreed to take over the brief. In my view, r 6(a) of the LP (P and E) Rules 1978 is applicable here as well. I have construed it to mean that an advocate and solicitor shall not accept any brief unless he is able to comply with the directions given by the court in regard to the pre-trial case management of the case.

[84] In my view, the delay and failure on the part of the defendant to comply with the court's directions has prejudiced the plaintiff and this prejudice cannot be compensated by an order for costs. The plaintiff's learned counsel has duly complied with the court's directions and has prepared the witness statements of the plaintiff's six witnesses. She is ready to exchange it with the defendant's one witness statement. She is ready to proceed with the conduct of the plaintiff's case during the full trial.

CONCLUSION

[85] In view of the reasons as set out above, the court is of the view that the

said decision is just and fair to both parties and was within the discretion of the court to make pursuant to O 34 r 2 (3) of the RC 2012.

Decision affirmed.

Reported by Ashok Kumar